

Guest Lecture Series of the Office of the Prosecutor

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“Confronting complex international crime in free societies”

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Personal introduction and thanks for invitation.

1. I have chosen to talk to you today about confronting complex international crime in free society.
2. What do I mean by complex international crime? Well, in this context I am not using what might perhaps be described as the purist definition of international crime – the crimes of universal jurisdiction; piracy, slavery, torture, grave breaches of Geneva conventions – but what the layman might regard as international crime – terrorism, drug trafficking, human trafficking, cyber crime and international fraud. Why are these crimes complex?
3. These crimes are complex because they use complex methods, they raise complex issues and they require what might be described as complex, certainly more sophisticated methods, to deal with them.
4. There has been much talk in the last few years about the “war on terror.” A military response may well be appropriate in some circumstances. Terrorism remains however principally a crime and must be treated as such.
5. This court seeks to further the primary objective of the United Nations, peace and justice for all. It seeks to end impunity by ensuring individual responsibility for crimes that may be committed in the name of a cause, but which are committed by individuals. It seeks to deter future crimes within its jurisdiction by demonstrating that the international community will assign responsibility and mete out appropriate punishment.
6. Perhaps above all, this court provides the catalyst for the restoration of the rule of law after times of crisis. In a similar way, national criminal law and national criminal courts must ensure that no matter how dire the threat, the rule of law and due process prevail.
7. The criminal justice process must of course be suitably equipped to deal with the particular challenges that terrorism and other complex crimes present.
8. Whilst international terrorism has always been a threat, the experience of many states has by and large been restricted to what might be described as domestic terrorism. In recent years, as we all know only too well, the threat of international terrorism has affected the lives of us all to varying degrees.
9. The international terrorist seeks to influence governments and the public to advance a political, religious or ideological cause, or worse still, if that were possible, simply eliminate those perceived to be the enemy. These causes are not restricted to one state and the international terrorist does not find his enemy in one state.
10. Terrorists travel the world to recruit and train and gather funds that they move around by sophisticated means. They establish networks amongst like-minded groups around the world and hide themselves amongst the communities whose interests they claim to serve.
11. The drug trade is of course one of the oldest and it has always been international as the raw materials and those hooked on the finished product are often to be found on different sides of the world. Between the raw product and the users are refiners, smugglers, middle-men, those who supply the suppliers and those who supply the users.
12. These people have their networks as well. They cross borders. They move their money around. They cultivate not only drugs and users but also new markets. They prey on the most vulnerable in our society. They make immense profit at the cost of misery and suffering to us all.
13. In many ways those involved in human trafficking operate in the same way as the drug traffickers. From their cynical and callous perspective this is unsurprising, since they see themselves as trafficking in a commodity, simply providing a supply to meet a demand. Like the drug traffickers they make vast profits at the expense of human misery and suffering and perhaps more so even than the drug traffickers, they exploit some of the most vulnerable in society.

14. Cyber crime is a more recent phenomenon. It is perhaps a perfect example of how the sophisticated, organised and therefore frequently international criminal will always exploit new opportunities. Not so many years ago few of us had even heard of the Internet, yet alone used it. Nowadays it is of course inextricably linked to all aspects of our lives. It has given us all a capacity to communicate, buy and sell that was previously unimaginable.
15. But, as we know, sophisticated criminals around the world are exploiting this facility, and more worryingly, the apparent anonymity of the user. The methods they use are sophisticated, sometimes almost beyond the comprehension of anyone other than the experts.
16. In the same way that the cyber-criminal is exploiting new and more sophisticated methods of communication and trade, the international fraudster continues to develop new and innovative ways of stealing our money. Whilst governments, banks and businesses and organisations like the European Union are often the targets of these criminals, we are the victims as the cost is ultimately of course born by us all.
17. I have of course greatly simplified the methodology of these crimes and the issues that these crimes present. I know that I have not done justice to the extent of the threat and the harm done to us all. I hope however that I have defined sufficiently the scope of complex, international crime for the purposes of this discussion.
18. It is I think increasingly accepted that in order to tackle this threat, we need to be as innovative and dare I say audacious as the criminal. Some jurisdictions have faced the threat for longer than others and as a result they have already been through the process or are further down the road than others. Some jurisdictions have responded more recently to the threat and some perhaps have yet to do so.
19. Different jurisdictions are at different stages in the process, they face perhaps slightly different threats and they respond in slightly different ways. We also know that no matter how innovative the response, it will be restrained by the fundamental principles and procedures of our legal systems and rightly so.
20. We must however distinguish between fundamental restraints and being hidebound by established thinking. It is right that we should look for better ways to deal with these crimes, but we must not lose sight of the fundamental rights and values that our systems encapsulate. New and innovative means of combating complex international crime must not be at the cost of the rights that are fundamental to free society.
21. This theme will be central to what we talk about today. It is something that I believe strongly in. It is something that I believe we should all not only believe in, but also implement conscientiously.
22. The protection of fundamental rights is not the sole preserve of those who may be identified as human rights lawyers. It is something that should be fundamental to all actors in the criminal justice process, investigators, prosecutors and judges, because the criminal justice process is after all, all about preserving the fundamental balance between the rights of an accused person and the rights of society.
23. When we look for innovative ways of tackling serious and complex crime, when we challenge established ways of doing things and seek to avoid being hidebound, we should perhaps first of all consider what should not be challenged, what is non-negotiable.
24. What are the fundamental principles that cannot be negotiated? They will I am sure they will be familiar to you all. There should be a fair trial, routinely open, before an independent and impartial tribunal. There should be equality of arms between the prosecutor and the defendant. The defendant has the right to full disclosure of the case against him.
25. By virtue of the Human Rights Act 1998 public bodies in the UK, including courts and public prosecutors, must act in accordance with the principles of the European Convention on Human Rights and Fundamental Freedoms.

26. When considering due process we refer principally Article 6 of the Convention, the right to a fair trial. The Convention protects these rights because that is what they are, human rights, and fundamental to our freedom. These principles are of course encapsulated in similar conventions around the world and the Rome Statute and the Rules of Procedure and Evidence adopted by this court.
27. I have talked about the nature of complex international crime and the need to challenge established methods of dealing with it, which must be tempered by the non-negotiable fundamental rights of a fair trial. I am now going to look briefly at some of the methods that the law has employed in the United Kingdom. I'll say something about how these methods have been tested and checked by the principles of fair trial and how the law has adapted as a result.
28. The United Kingdom has had anti-terrorism legislation for a number of years, principally directed at Irish republican terrorism. By anti-terrorism legislation I mean law targeting terrorists rather than the general law that is equally applicable to terrorists such as murder, possession of firearms and explosives and causing explosions.
29. Our present legislation, the Terrorism Act 2000 and the Anti-Terrorism Crime and Security Act 2001, which in part implemented Security Council Resolutions 1368 and 1373 following the events of September 11th 2001, are we think modern and comprehensive pieces of legislation. They incorporate however a number of concepts that were earlier employed in the legislation directed at Irish republican terrorism.
30. The emergency situation in Northern Ireland in the early 1970s led to the introduction of the first of a number of pieces of temporary legislation. There can be no doubt that the situation in Northern Ireland at that time could properly be described as an emergency. There have been great changes for the better in recent years.
31. Between 1973 and 1983 over 2000 deaths in Northern Ireland, then with a population of about 1.5 million, were attributed to terrorism, as compared to about 100 such deaths in the rest of the UK, then with a population approaching 60 million. This dreadful situation resulted in legislation that sought to tackle the problem.
32. The legislation was temporary in that it had to be renewed periodically by Parliament, initially every 6 months, later annually. By this process it was intended that Parliament would monitor whether there was a continuing need for these exceptional powers and scrutinise their use. By contrast, our present legislation will remain in force until amended or repealed.
33. For the first time the law permitted a trial court to draw adverse inference from the silence of the accused, either when questioned by the police or when given an opportunity to give evidence at his trial.
34. The provision was (and is) put on the basis that it is really a matter of common sense, that there are situations that properly and fairly call for an explanation from an accused and that in the absence of an explanation a court could properly infer that there was no lawful explanation. The provision undoubtedly made inroads into an area previously considered sacrosanct and in doing so sought to strengthen the ability of the criminal law to deal with a crime that it was struggling to come to grips with.
35. In *John Murray v UK*¹ the trial court exercised its discretion under the law to draw adverse inferences from the fact that Murray refused to account for his presence at a house where a suspected IRA informer had been held prisoner and interrogated.
36. As the law then permitted, the police refused Murray access to a solicitor and Murray chose to remain silent during a number of interviews with the police that followed. When Murray's appeal against his conviction was dismissed he appealed to the European Court of Human Rights in Strasbourg on the basis that his Article 6 rights had been infringed.

¹ *John Murray v United Kingdom* (1996) 22 E.H.H.R. 29

37. Murray said that the burden of proving the case against him rested entirely on the prosecution and that he was to be presumed innocent until the prosecution had done so. His case was that the provision allowing adverse inferences to be drawn from his silence effectively reversed that burden and the presumption by requiring him to give evidence to prove that he was innocent.
38. Whilst the court did not agree with his claim that his right to silence was absolute, the court was critical of inferences being drawn from the silence of an unrepresented suspect. Similar arguments were subsequently made to the Court in *Magee v UK*² and *Averill v UK*.³
39. In 1994 provisions permitting inferences to be drawn from silence were incorporated in the general criminal law of the UK.⁴ These provisions permit trial courts to draw adverse inferences from the failure or refusal of the defendant to mention facts when questioned by the police or charged, to give evidence at his trial, to account for the presence of objects, substances or marks that connect him to the crime or similarly, his failure to account for his presence at a particular place.
40. However, perhaps following the lessons learned in *John Murray* and the cases that followed, these inferences can only be drawn from the silence of the accused once he has had the opportunity to obtain legal advice.⁵
41. The use of what has become known as “reverse burden” provisions has presented similar challenges as to their compatibility with Article 6. The Terrorism Act 2000 employs another device previously employed in the temporary Northern Irish legislation, that of proscription. The Secretary of State, a government minister, may proscribe an organisation that is concerned in terrorism.⁶
42. A number of offences flow from proscription. One is that it is an offence to belong to a proscribed organisation.⁷ The statute also affords a statutory defence. It is a defence for a person charged with an offence to prove that the organisation was not proscribed when he was last a member or that he has not taken part in the organisation’s activities since proscription.
43. This provision has also been challenged on the basis that it interferes with the presumption of innocence,⁸ that is, that it reverses the burden of proof. The court found that this provision could be read down so as to be compatible with Article 6.
44. The court said that it was appropriate to impose the legal burden on the accused, having regard to the public interest in the suppression of terrorism and the unrealistic burden that would otherwise be borne by the prosecution in excluding the statutory defence.
45. This view accorded with the jurisprudence of the European Court.⁹ Certain limits must be observed as to extent to which presumptions of law or fact are acceptable, but those limits must be reasonable ones that take into account the importance of what is at stake and maintain the rights of the defendant.
46. Some observers may say that the fact that these provisions were challenged at all as being incompatible with the fundamental principle of the right to a fair trial reflects badly on the commitment of the United Kingdom to respect these rights. That is one view.
47. Another is that these were and are appropriate and proportionate measures to tackle a very real threat. They were properly defined measures that were tested by independent tribunals and to the extent that they were found wanting, measures that were amended accordingly.

² *Magee v United Kingdom* (2001) 31 E.H.R.R. 822

³ *Averill v United Kingdom* (2001) 31 E.H.R.R. 372

⁴ Sections 34 – 37 Criminal Justice and Public Order Act 1994

⁵ Following amendment by Section 58 of the Youth Justice and Criminal Evidence Act 1999

⁶ Commits or participates, prepares for, promotes or encourages or is otherwise concerned in terrorism.

⁷ Section 11(1) Terrorism Act 2000

⁸ Attorney General’s Reference (No. 4 of 2002) [2003] 2 Cr App R 346

⁹ *Salabiaku v France* (1988) 13 EHRR 379

48. I have talked about the use of innovative measures in anti-terrorist legislation, measures that have been carried over to the general criminal law. No doubt a similar process has occurred in other jurisdictions.
49. I said at the outset that complex crimes require a complex response, certainly a sophisticated one. Much of the criminal activity of organised international criminals goes unseen. It is often only the tragic consequences that are seen by the public at large.
50. These crimes are not witnessed in the way that ordinary crimes are. Witnesses are often those involved in the crime, or at least those on the periphery. If these people are to give evidence they require protection and assurances as to how they will be dealt with. Conversations are not overheard. They are intercepted.
51. Courts rely upon the testimony not just of eye-witnesses, but undercover agents and surveillance teams. Many investigations these days are led by information gathered by intelligence agencies at home and abroad.
52. These techniques are of paramount importance in meeting the challenge presented by complex international crime. These techniques can and must be governed by the rule of law. In protecting accomplices who give evidence against co-conspirators, in protecting sensitive sources of information, the rights of the accused must not be ignored. It is a question of striking an appropriate balance.
53. In the UK we have responded to the challenge of finding and maintaining this balance and the prosecutor is central to this. Sensitive investigative techniques will inevitably give rise to tensions with certain parts of the ECHR.
54. Our law¹⁰ requires that covert or intrusive police methods be rigorously scrutinised for their necessity and proportionality. The legal regime is carefully constructed and consists of acts of parliament and published codes of practice that require high levels of authority and independent scrutiny by commissioners who have previously held high judicial office.
55. The law¹¹ on withholding any non-evidential material gathered in the course of a criminal investigation is similarly detailed, with appropriate checks and balances. The law, and therefore the court, places heavy reliance upon the integrity, objectivity and independence of the prosecutor in this process.
56. The golden rule is that the prosecutor must disclose his case against the defendant, the evidence upon which he relies. He must also disclose to the defendant any non-evidential material that weakens the prosecutor's case or assists the defendant's case.
57. But to strike the appropriate balance, to allow investigators and prosecutors to use sensitive techniques, the law permits the prosecutor to derogate from this where an important public interest arises, such as the protection of informants or sensitive investigative methods. However, in accordance with the law, the court will not permit any material to be withheld from the defence that might imperil the overall fairness of the proceedings.
58. We are presently looking at further ways to strengthen the capacity of the criminal justice system of the United Kingdom to deal with serious and organised crime.
59. As part of this process we are learning from not just our experiences but also those of other jurisdictions. We are therefore considering measures that will encourage criminals to give evidence against fellow criminals by prosecutors being able to enter into co-operation agreements or perhaps even offer immunity in appropriate circumstances.
60. We will also consider giving prosecutors special powers to compel witnesses to produce evidence and to allow prosecutors to interview witnesses before trial. In this respect I have to accept that we

¹⁰ Police Act 1997 and Regulation of Investigatory Powers Act 2000.

¹¹ Criminal Procedure and Investigations Act 1996.

- in the UK may be lagging behind other jurisdictions. Any such measures should permit investigators and prosecutors to deal more effectively not only with organised crime but also terrorism.
61. Undoubtedly any such measures will challenge accepted thinking about the criminal justice process in our jurisdiction. Such measures will of course have to bring with them appropriate safeguards for the rights of the accused, whilst endeavouring to maintain or perhaps in some respects restore the balance between the defendant's rights and the right of society to protect itself from harm.
 62. The protection of the public from harm will central to any new UK legislation in this area and to the constitution of the Serious and Organised Crime Agency, a new organisation that will be dedicated to tackling the threat of complex international crime.
 63. In my view the prosecutor will increasingly be central to safeguarding not only the public interest but also the interests of accused, indeed any special investigative measures will probably be vested in the prosecutor who, increasingly in the UK, works closely with investigators from the earliest stage of complex and sensitive investigations that are carried out with a view to criminal proceedings.
 64. I have talked about balancing the rights of the accused with those of the community. This is due process and I am firmly of the view that central to this due process in criminal cases is a properly empowered, independent prosecutor, a prosecutor who brings proceedings free from political pressure or other inappropriate influences.
 65. The public prosecutor brings criminal proceedings in the public interest where there is a realistic prospect that the proceedings will result in a conviction.
 66. Making this decision requires an understanding of the difference between sufficient evidence to arrest or charge and sufficient evidence to maintain a prosecution. It requires not just this understanding but also a will, the strength of conviction, to take what are often very difficult decisions accordingly. Decisions that are often then subject to ill-informed comment.
 67. If the prosecutor does not have this understanding and does not make the right decisions, we risk miscarriages of justice, the innocent may be convicted. Even if due process prevails, if the innocent are acquitted, those charged with serious crime will often have been held in custody until their trial.
 68. Some may say that this is perhaps the price that has to be paid for security and order. This cannot be right. But even if it were, those that hold such views should consider that if an innocent man is prosecuted for a crime, a guilty man may get away with it.
 69. The investigation and prosecution of cases of complex international crime will test these principles to the full and the resolve of the prosecutor to hold firm to them.
 70. Whilst prosecutors in the UK are increasingly involved in the investigation, helping to shape investigations and inform strategic operational choices, when the investigation concludes, the prosecutor must decide upon proceedings.
 71. My prosecutors are governed by a code. The code says that proceedings should only be brought where there is sufficient evidence to provide a realistic prospect of a conviction and, if there were, whether proceedings would be in the public interest. No doubt similar principles guide prosecutors in other jurisdictions.
 72. In the aftermath of a terrorist atrocity there will always be calls for the perpetrators to be caught and punished at all cost. In such a climate the prosecutor must stand firm to his principles. I make no apology for returning to terrorist cases because I think they provide the clearest illustration of what I am talking about.
 73. It may not always be difficult to make firm, principled decisions about due process in routine cases. It can be a lot harder to make them when the stakes are high. When the crime in question is a

terrorist atrocity, either one that has been committed or one that has only been planned it, can be a lot harder. Prosecutors come under pressure, like everyone else involved in the process. Not directly of course, but they know what is at stake, they are after all part of the community that is threatened.

74. The right decisions must be made because this is where the rule of law is really put to the test and it must not fail. Terrorism by its very nature threatens democracy. It seeks to challenge our way of life, the principles that govern our society. It seeks to achieve change by unlawful force. If in response we lose sight of the rule of law, then we play by the rules of the terrorist.
75. An independent, impartial prosecutor is central to due process. An independent prosecutor brings proceedings in the public interest and therefore effectively upon behalf of the public. The public prosecutor, as part of the criminal justice process, is trusted by the public to protect it from harm.
76. There is in effect a contract between the prosecutor and the public. The public will support the tough, lawfully audacious prosecution of those who threaten their lives or their livelihood. But the terms of the contract are that the prosecutor protects not just the public, but also the fundamental values of society that are threatened, security, democracy, tolerance, an impartial government and executive.